COACHELLA VALLEY WATER DISTRICT

IBLA 85-308 Decided March 27, 1985

Appeal from a decision of the California State Office, Bureau of Land Management, terminating right-of-way R-1388.

Affirmed.

1. Rights-of-Way: Act of February 15, 1901 -- Rights-of-Way: Cancellation

   A right-of-way issued under the Act of February 15, 1901, for a dike system is properly revoked as an exercise of the discretion of BLM where the holder fails for over 15 years to develop it, in violation of an express condition in the right-of-way imposing a deadline for completion of development, and where BLM wishes to remove encumbrances on title to the subject lands to allow consummation of a land exchange to protect the habitat of a threatened animal species.

APPEARANCES: Joseph S. Aklufi, Esq., Riverside, California, for appellant; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

The Coachella Valley Water District (CVWD) has appealed the December 7, 1984, decision of the California Desert District Office, Bureau of Land Management (BLM), terminating right-of-way R-1388. On February 4, 1985, BLM, through counsel, appeared and filed its answer, in which it requested that the Board grant expedited consideration to this appeal. This request is granted.

Right-of-way R-1388 was granted to CVWD on December 16, 1969, under the Act of February 15, 1901, 43 U.S.C. § 959 (1970), for a dike system along the west side of the Coachella Valley. 1/ Under this Act, the Secretary was

1/ This Act was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793. Rights-of-way on public lands are now covered by Title V of FLPMA, 43 U.S.C. §§ 1761-1771 (1982).

empowered, inter alia, to permit the use of rights-of-way through public lands in California for water plants, dams, reservoirs, and other uses.

The right-of-way was granted to CVWD in 1969 subject to the following condition: "Upon completion of construction [of the west side dike system stormwater works], proof thereof should promptly be filed with this office. A period of 5 years from the date of approval of this right-of-way is allowed for construction." On October 29, 1974, CVWD requested additional time in which to submit proof of construction. By letter dated February 6, 1975, BLM granted CVWD an extension of time to, and including December 16, 1980, within which to submit proof of construction.

On October 29, 1984, BLM advised CVWD that it was considering cancelling the right-of-way, due to CVWD's failure to complete construction timely, so that the lands could be freed for a land exchange with the Nature Conservancy (TNC). 2/ On November 30, 1984, CVWD filed a request for an extension of time to complete construction, noting that this right-of-way was valuable to the proposed Oasis area flood control project.

On December 7, 1984, BLM issued its decision denying the extension request and cancelling the right-of-way.

[1] A right-of-way granted pursuant to the Act of February 15, 1901, may, in the discretion of BLM, be canceled for either abandonment or nonuse. H. L. Townsend, 26 IBLA 175 (1976). BLM's discretion to cancel is statutory. The Act expressly provides that "any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion." (Emphasis supplied.) This right of revocation was also set out in the Departmental regulations in effect at the time the right-of-way was issued to CVWD, at 43 CFR 2234.1-3(a) (1969): "The interest granted shall consist of an easement, license or permit in accordance with the terms of the applicable statutes; no interest shall be greater than a permit revocable at the discretion of the authorized officer unless the applicable statute provides otherwise." (Emphasis supplied.) The rights granted under the Act of February 15, 1901, convey nothing more than a revocable permit. U.S. v. Colorado Power Co., 240 F. 217, 220 (D. Colo. 1916); Circular, 31 L.D. 13, 14 (1901). The Supreme Court so ruled in Swendig v. Washington Water Power Co., 265 U.S. 322, 329, 331 (1923).

It is undisputed that CVWD has not completed, or even begun, construction of the west side dike system stormwater works for which the right-of-way was granted. Thus, CVWD failed to meet the deadline for completion of construction imposed by BLM in 1969 and extended in 1975. BLM's decision to cancel a right-of-way issued under the Act of February 15, 1901, for nonuse, made in the exercise of its discretion, will be affirmed when the record shows

2/ TNC has evidently purchased privately owned property that is habitat for the Coachella Valley fringe-toed lizard, which is on the Federal threatened species list and the California endangered species list. TNC has proposed to BLM an exchange of these habitat lands in return for the lands encumbered by the right-of-way in this case. Under this proposal, the habitat lands will came into Federal ownership, and will be included in a fringe-toed lizard wildlife preserve. In return, the lands that are the subject of this appeal will be transferred to the ownership of TNC.

it to be a reasoned analysis of the factors involved, made in due regard for the public interest, and when no sufficient reason to disturb the decision is shown. See Jack M. Vaughan, 25 IBLA 303 (1976).

CVWD contends that it is not in the public interest to cancel its right-of-way, alleging that "the people in the Oasis area will live under the threat of catastrophic damage and loss of life" (Statement of Reasons at 2). This general charge is made more specific in CVWD's supplemental brief filed March 8, 1985, in which it is stated:

> 3. The District has explained to the Bureau of Land Management that the Coachella Canal crosses the San Andreas Fault in two locations and runs parallel to the Fault for approximately 20 miles. In the event of an earthquake and failure of the Canal, a portion of the public lands is essential to the repair of the Canal.
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> 4. The affected lands are also essential for flood control facilities designed, in part, to protect sections of the Coachella Canal, as well as private property. The inability to provide such flood control protection threatens the Canal, as well as life and property.
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> 5. A portion of the withdrawn lands requested by the Bureau of Land Management is situated along the ancient Lake Cahuilla Shoreline; therefore, such lands are the only source of the special sand-gravel material used in agriculture for farmtile drainage. Without adequate drainage systems, soil becomes saturated with imported salt carried there by irrigation water.
> 6. If deprived of the lands in question, the Coachella Valley Water District predicts the following:
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> > (a) The seismic failure of the Canal will result in severe, unavoidable damage to agricultural crops if repair materials are not available; and
> >
> > (b) The inability to provide flood control facilities threatens the safety of the Canal as well as the safety of lives and property; and
> >
> > (c) Without adequate drainage materials, agricultural land will be rendered useless due to excessive salt content.

Supplemental Brief at 2-3.

We hold that there was ample justification for BLM to exercise its discretionary power to revoke CVWD's right-of-way. CVWD's concern for dire consequences that could result from cancellation of the right-of-way grant is belied by its failure over a 15-year period to develop the right-of-way in accordance with the terms of the grant. To CVWD's averment that the flood control project will cost $43 million and that substantial time is

needed to develop funding sources, we note that no attempt is made to chronicle its funding efforts or progress towards construction from 1969 to the present.

BLM wishes to use the lands encumbered by the right-of-way as selected lands in a land exchange that will protect a threatened animal species. Protection of wildlife is a legitimate factor in considering whether the public interest is served by cancellation of a right-of-way. See Scott Hampson, 18 IBLA 230 (1974). Cancellation of the right-of-way for failure to develop it as required will enable BLM to offer clear title to these lands to the exchange applicant. Under the circumstances, BLM's decision was a reasonable exercise of the discretion granted to it by the enabling statute and implementing regulations. It was not an abuse of discretionary authority to cancel a right-of-way relegated to nonuse in favor of pursuing a land exchange proposal that is in the public interest for the protection of wildlife.

CVWD has requested that it be granted a hearing in this matter. This request is denied. Right-of-way holders are entitled to hearings prior to cancellation as a matter of right only where the enabling legislation expressly so provides. See James W. Smith (On Reconsideration), 55 IBLA 390, 396 (1981) (holding that the right to a hearing regarding a right-of-way cancellation under FLPMA, 43 U.S.C. § 1766 (1982), applies only to rights-of-way issued under that Act). The Act of February 15, 1901, grants BLM broad discretion to cancel rights-of-way without the necessity of convening hearings. CVWD's due process rights are, of course, protected by its right to appeal to this Board. 3/

CVWD argues that BLM erred by cancelling its right-of-way without preparing an environmental impact statement (EIS), as required by section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (1982). It does not appear that CVWD has made this argument prior to this appeal. However, it is unnecessary to remand the matter to BLM for consideration of this question, as it is our holding that no EIS need be prepared in this case. Preparation of an EIS is required only when BLM's decision constitutes "major Federal action significantly affecting the quality of the human environment." 43 U.S.C. § 4332 (1982).

Although CVWD has alleged certain environmental consequences to BLM's cancellation, it has not established that such cancellation constitutes "major federal action." The question whether NEPA requires an EIS necessitates an analysis of whether the action contemplated is "major," and if so, whether it significantly affects the quality of the human environment. Absent either, an EIS is not required. Julis v. Cedar Rapids, Iowa, 349 F. Supp. 88, 89 (N.D. Iowa 1972). The term "major" relates to those Federal actions of superior, larger, and considerable importance, involving substantial expenditures of money, time, and resources. Id.; Natural Resources

3/ The Board has the authority to order evidentiary hearings, as appropriate, in any administrative appeal regardless of whether statutory or regulatory provisions provide a right to a hearing. See 43 CFR 4.415. Here, the facts on which BLM based its discretionary decision to cancel CVWD's right-of-way are not in dispute. Accordingly, we can determine from the record as constituted whether its decision was rational and made with due regard for the public interest. Jack M. Vaughan, supra.

Defense Council, Inc. v. Grant, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972). Cancellation of CVWD's right-of-way is not a "major federal action."

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Bruce R. Harris
Administrative Judge